Lagenda Kencana Sdn Bhd v Peter's Holdings Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-2379 OF 2010
RAMLY ALI, LINTON ALBERT AND AZIAH ALI JJCA
18 AUGUST 2011

Civil Procedure — Judgments and orders — Consent order — Setting aside — Want of authority — Solicitors representing plaintiff dissolved and lawyer handling plaintiff's file joining another firm without plaintiff's knowledge — Notice of change of solicitors not filed — Lawyer subsequently withdrawing case — Whether counsel lack of authority ground for setting aside consent order — Whether injustice occasioned to be considered in setting aside consent order

Civil Procedure — Rules of procedure — Observance of — Change of solicitors — Whether non-filing and serving of notice of change of solicitor mere irregularity — Rules of the High Court 1980 O 64 r 1

The appellant/plaintiff had filed an action against the respondents/defendants claiming damages for breach of duty of care and trespass. The action was filed by Messrs Scott & Kuhan as the solicitors acting on behalf of the appellant. Subsequently Messrs Scott & Kuhan was dissolved and the lawyer who was handling the matter, Mr J Jeyakuhan, had joined Messrs Rastam Singa & Co. This was never made known to the appellant. When the case came up for trial, Mr Jeyakuhan attended court and, with consent of the respondent, withdrew the case with liberty to file afresh. The appellant contended that it had never given any instruction or authority to Mr Jeyakuhan or Messrs Rastam Singa & Co to act on its behalf and to withdraw the action. Messrs Rastam & Singa was never appointed by the appellant and the said firm had never filed any notice of change of solicitors to act for the appellant in the said action. Despite the claim having been withdrawn with liberty to file afresh, the appellant could not refile the claim afresh as it was already statute barred by then. The appellant therefore applied to set aside the said consent order. The learned High Court judge dismissed the application and hence, this appeal.

Held, allowing the appeal with costs:

(1) A consent order is an order of the court carrying out an agreement between the parties. A consent order can thus be set aside on the same grounds as those on which an agreement may be set aside; *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 referred (see para 20).

(2) There must be *consensus ad idem* existing between the parties for the

consent order to be recorded. The consent order in effect is an agreement between the appellant and the respondents, not between their counsel or solicitors. If there is clear indication that the consent order was recorded without the authority or knowledge of the parties or any one of them (as in the present case) then, as an agreement, there is no *consensus ad idem* and the validity of the said consent order can always be challenged and the consent order can ultimately be set aside, particularly where the effect of which, if not set aside, would cause grave injustice to the party in question (see paras 12–13).

(3) Mr Jeyakuhan from Messrs Rastam Sihga & Co had no locus standi to represent the appellant and to record the consent order on behalf of the appellant. There was no notice of change of solicitors filed by Messrs Rastam Singa & Co pursuant to the mandatory rule under O 64 r 1 of the Rules of the High Court 1980 ('RHC'). The non-filing and serving of a notice of change of solicitor in the context of the facts of the present case was not a mere irregularity which could be construed as a technical non-compliance of the RHC, but something more serious than that. Non-compliance of O 64 r 1 had occasioned a substantial miscarriage of justice (see paras 16–17).

(4) The issue of grave injustice is an important consideration in an application to set aside a consent order. In the present case there was a clear indication that the appellant actually never wanted to withdraw its claim against the respondents and wanted to proceed with the case. Even though the action had been withdrawn with liberty to file afresh, the appellant could no longer refile the action afresh due to the issue of limitation. Therefore the appellant was seriously prejudiced if the said consent order was not set aside. By contrast, the respondents would not be seriously prejudiced if the said consent order was set aside (see para 22).

[Bahasa Malaysia summary

Perayu/plaintif telah memfailkan tindakan terhadap responden-responden/defendan menuntut ganti rugi untuk kemungkiran kewajipan berhati-hati dan pencerobohan. Tindakan difailkan oleh Tetuan Scott & Kuhan sebagai peguam bertindak bagi pihak perayu. Kemudiannya Tetuan Scott & Kuhan dibubarkan dan peguam yang mengendalikan perkara tersebut, En J Jeyakuhan, telah menyertai Tetuan Rastam Singa & Co. Perkara ini tidak diberitahu kepada perayu. Apabila kes tersebut disebut untuk perbicaraan, En Jeyakuhan menghadiri mahkamah dan, dengan izin responden, menarik balik kes tersebut dengan kebebasan untuk memfailkan kes baru. Perayu berhujah bahawa ia tidak pernah memberikan arahan atau kuasa kepada En Jeyakuhan atau Tetuan Rastam Singa & Co untuk bertindak bagi pihaknya dan untuk menarik balik tindakan tersebut. Tetuan Rastam & Singa tidak pernah dilantik oleh perayu dan firma tersebut tidak pernah memfailkan apa-apa notis

pertukaran peguam-peguam untuk bertindak untuk perayu dalam tindakan tersebut. Walaupun tuntutan tersebut ditarik balik dengan kebebasan untuk memfailkan tuntutan baru, pada masa itu perayu tidak dapat memfailkan semula tuntutan baru kerana ia dihalang oleh statut. Perayu oleh itu memohon untuk mengenepikan perintah izin tersebut. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan tersebut dan maka rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Perintah izin adalah perintah mahkamah yang melaksanakan perjanjian antara pihak-pihak. Perintah izin oleh itu boleh diketepikan atas alasan yang sama seperti yang terdapat atas mana perjanjian boleh diketepikan; *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 dirujuk (lihat perenggan 20).

(2) Mesti terdapat *consensus ad idem* wujud antara pihak-pihak untuk perintah izin direkodkan. Perintah izin sebenarnya adalah perjanjian antara perayu dan responden-responden, bukan antara peguam-peguam mereka. Jika terdapat arahan yang jelas bahawa perintah izin direkodkan tanpa kuasa atau pengetahuan pihak-pihak atau sesiapa saja daripada mereka (seperti dalam kes ini) oleh itu, sebagai perjanjian, tidak terdapat *consensus ad idem* dan kesahan perintah izin tersebut sentiasa boleh dicabar dan perintah izin tersebut kesudahannya boleh diketepikan, terutamanya di mana kesan, jika tidak diketepikan, akan menyebabkan ketidakadilan yang teruk kepada pihak tersebut (lihat perenggan 12–13).

(3) En Jeyakuhan daripada Tetuan Rastam Sihga & Co tidak mempunyai locus standi untuk mewakili perayu dan untuk merekodkan perintah izin bagi pihak perayu. Tidak terdapat notis pertukaran peguam difailkan oleh Tetuan Rastam Singa & Co berikutan peraturan mandatori di bawah A 64 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Tanpa memfailkan dan menyerahkan notis pertukaran peguam dalam konteks fakta kes ini bukan ketaksekataan semata-mata yang boleh ditafsirkan sebagai ketidakpatuhan teknikal KMT, tetapi sesuatu yang lebih serius daripada itu. Ketidakpatuhan dengan A 64 k 1 telah menyebabkan ketidakadilan yang substansial (lihat perenggan 16–17).

(4) Isu ketidakadilan yang teruk adalah pertimbangan yang penting dalam permohonan untuk mengenepikan perintah izin. Dalam kes ini terdapat arahan yang jelas bahawa perayu sebenarnya tidak pernah hendak menarik balik tuntutannya terhadap responden-responden dan hendak meneruskan dengan kes tersebut. Walaupun tindakan telah ditarik balik dengan kebebasan untuk mefailkan tuntutan baru, perayu tidak lagi boleh memfailkan semula tindakan baru akibat isu had masa. Oleh itu perayu dengan serius diprejudiskan jika perintah izin tersebut tidak

diketepikan. Sebaliknya, responden-responden tidak akan terprejudis dengan serius jika perintah izin tersebut diketepikan (lihat perenggan 22).]

Notes

For cases on consent order, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4513–4531.

For cases on observance of rules of procedure, see 2(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6838–6845.

Cases referred to

Concrete Engineering Products Bhd v Merces Builders Sdn Bhd & Anor [2004] 3 MLJ 367; [2004] 2 CLJ 531, HC (refd)

Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273, CA (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)

Marsden v Marsden [1972] 2 All ER 1162 (refd)

Sathivel Alagarsamy v Lakshmi Vellasamy [1998] 3 CLJ Supp 343, HC (refd)

S Pakianathan v RK Stallard [1979] 2 MLJ 251, FC (refd)

Stewart v Complex (1990) 107 NBR 407, QB (refd)

Waitemata City Council v Mackenzie [1988] 2 NZLR 242, CA (refd)

Legislation referred to

Limitation Act 1953 s 6(1)

Rules of the High Court 1980 O 64 r 1

Appeal from: Civil Suit No MT4–22–278 of 2002 (High Court, Shah Alam)

Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the appellant.
KB Tan (KB Tan, Kumar & Partners) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] On 24 April 2002 the appellant (who was the plaintiff in the court below) filed an action against the respondents (who were the defendants in the court below) claiming damages for breach of duty of care and trespassing by the respondents and damages for the loss of rights as the developer for quiet employment of the land in question. The writ and the statement of claim were filed by Messrs Scott & Kuhan, as the solicitors acting on behalf of the appellant.

[2] At the close of pleadings, the court fixed 8–10 July 2009 as the trial date for the case. Parties were duly informed of the trial dates.

[3] On 20 January 2009, the said firm of solicitors, Messrs Scott & Kuhan was dissolved and the lawyer who was handling the matter in that firm Mr J Jeyakuhan has since practiced in a new firm known as Messrs Rastam Singa & Co. This was never made known to the appellant at the material times.

[4] When the case came up for trial on 8 July 2009, Mr Jeyakuhan claimed to be still acting on behalf of the appellant (even after the said firm of Messrs Scott Kuhan was dissolved on 20 January 2009) had attended court and informed the court that 'pihak-pihak bersetuju Plaintif menarik balik kes dengan kebebasan untuk memfailkan semula dengan tiada perintah bagi kos' (ie both parties had agreed for the plaintiff to withdraw the case with liberty to file afresh and with no order as to costs) and the solicitors for the respondents agreed. On that day, the court recorded that 'kes dibatalkan dengan kebebasan untuk memfailkan semula dan tiada pen'ntah tentang kos atas persetujuan' (ie the case is struck out with liberty to file a fresh and with no order as to costs by consent).

[5] On 28 July 2009 Messrs Rastam Singa & Co, had by letter informed the appellant that the action was purportedly withdrawn 'upon direction of the court' and not withdrawn by the appellant with liberty to file afresh. From the notes of proceedings available in the court's file, it is clear that, the order was made 'by consent of both parties'.

[6] The appellant contended that it had never given any instruction or authority to Mr Jeyakuhan or Messrs Rastam Singa & Co to act on its behalf and to withdraw the action with liberty to file afresh. Further, on 8 July 2009, the firm Messrs Scott & Kuhan was already dissolved and there was actually no existing legal firm to represent the appellant in the court at that time. The appellant further claimed that Messrs Rastam & Singa was never appointed by the appellant and the said firm had never filed any notice of change of solicitors to act for the appellant in the said action. In short the appellant claimed that the said Mr Jeyakuhan from Messrs Rastam Singa & Co simply had no locus standi and authority to represent the appellant on 8 July 2009, when the said action was withdrawn with liberty to file a fresh.

[7] The withdrawal of the appellant's claim on 8 July 2009, even with liberty to file afresh, would severely prejudice the appellant. The appellant will not be able to refile the claim afresh against the respondents on the ground that the cause of action in tort would be statute barred as its six years limitation period had lapsed.

[8] The appellant then appointed a new firm of solicitors namely Messrs Sidek Teoh Wong & Dennis to act on its behalf. A notice of change of solicitors was filed in the court. The appellant then filed an application vide encl 27

(summons in chambers dated 22 October 2009) in order to set aside the said consent order recorded on 8 July 2009. On 7 July 2010 the learned High Court judge dismissed the appellant's application (encl 27) with no order as to costs. The appellant is appealing against the said order of dismissal and the respondents are cross-appealing against the order of no costs in favour of the respondents.

[9] The respondents averred that there was no inequitable conduct on the part of the respondents to induce the appellant into entering the said consent order. The respondents submitted that the issue whether Mr Jeyakuhan was still the solicitor acting on behalf of the appellant when the said consent order was entered into, is not a concern for the respondents' solicitors; this is especially so when Mr Jeyakuhan had been acting for the appellant since year 2000 in the earlier suit. The respondents also submitted that there are no evidence to show that the respondents either by themselves or through their solicitors had forced, coerced or made any representation to the appellant for the consent order to be recorded. The respondents also submitted that the appellant has failed to proffer a reason in any of its affidavits as to why it was not present in court on the date of the hearing if it had not intended for the said consent order to be entered on that date when full trial had been fixed for three consecutive days starting from 8 July 2009 ie the date when the consent order was entered into.

[10] In dismissing the appellant's application in encl 27, the learned High Court judge found that the knowledge of the solicitors is the knowledge of the client ie the appellant in this case; therefore learned judge found that the appellant's averment that it has no knowledge of the consent order cannot stand. Learned judge also held that it was irrelevant whether or not the solicitors in agreeing to the consent oder had acted in accordance with his client's instruction. The learned judge was of the view that lack of authorisation on the part of the solicitors cannot affect the third party ie the respondents herein; and the appellant should take an action against its solicitors for professional negligence and not to prejudice the respondents. Finally, the learned judge ruled that an order cannot be said to be null and void if there is no element of illegality or lack of jurisdiction.

SETTING ASIDE OF CONSENT ORDER

[11] The complaint of the appellant before us is that the consent order recorded on 8 July 2009 is not valid and had asked the court to set it aside. An order of a court is always deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside. It is a well established principle that a perfected consent order can only be set aside in a fresh action filed for the purpose. However, in a situation where grave injustice

was caused to the appellant the law allows the court of the first instance to set aside the consent order even though it has been sealed and perfected.

[12] A consent order is an order of the court carrying out an agreement between the parties. It is well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside (see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, at p 283). In this respect, Peh Swee Chin, FCJ in *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, at p 783 had ruled that 'it is elementary that the first requisite of a contract is that the parties should have reached agreement which would involve an offer and acceptance of the offer, inter alia'. There must be *consensus ad idem* existed between the parties ie the appellant and the respondents, for the consent order to be recorded on 8 July 2009.

[13] The consent order in effect is an agreement between the appellant and the respondents, not between their counsel or solicitors. Generally the consent of the parties are expressed and communicated through their respective solicitors, duly appointed to represent them. If there are clear indication that the consent order was recorded without the authority or knowledge of the parties or any one of them (as in the present case) then, as an agreement, there is no *consensus ad idem* and the validity of the said consent order can always be challenged and the consent order can ultimately be set aside, particularly where the effect of which, if not set aside, would cause grave injustice to the party in question.

[14] In a situation of grave injustice as in the present case, the appellant can make an application to set the consent order aside at the same court which recorded the consent judgment. There is no necessity to file a fresh separate proceeding for that purpose. The court may in appropriate circumstances set aside the consent order even though it has been sealed and perfected. In such a situation the court has the power to interfere with and set aside such a consent order even if the lack of consent on the part of the appellant or the limitation of counsel's authority was unknown to the other side. The said consent order should not be allowed to remain. This principle was adopted by the Federal Court in *Khaw Poh Chhuan's* case following the decision of the Court of Appeal in England, in *Marsden v Marsden* [1972] 2 All ER 1162.

[15] In the present case, when the application in encl 27 was filed by the appellant on 22 October 2009, the appellant had only received the sealed order dated 8 July 2009 from the respondent's solicitors on 28 October 2009, which was six days after the application was filed by the appellant. The application was filed 'either contemporaneously or sometime before' the sealed order is extracted and served on the appellant (similar to the situation in *Marsden v Marsden*). The court can entertain such an application. It seems to be a

manifest injustice to the appellant, to exclude its application from consideration on the basis that it may not have made it before the order was perfected. In *Marsden v Marsden* it was held in effect, as indicated in the 1979 White Book (The Supreme Court Practice) Part 2 at p 607, that:

> Where a party applies to have a consent order set aside on the ground that it was made without his consent and the application is made either before or contemporaneously with its being perfected, the court has a discretion to set aside the order where grave injustice would be done by allowing it to stand.

(The above passage was adopted by the Federal Court in *S Pakianathan v RK Stallard* [1979] 2 MLJ 251).

[16] Learned solicitors purportedly acting for and on behalf of the appellant, Mr Jeyakuhan from Messrs Rastam Sihga & Co has no locus standi to represent the appellant and to record the consent order on behalf of the appellant by withdrawing the appellant's claim on the relevant date 8 July 2009. The appellant had initially appointed the firm of Messrs Scott & Kuhan to act on its behalf. The said firm had been dissolved on 20 January 2009, long before the consent order was recorded. There was no notice of change of solicitors filed by Messrs Rastam Singa & Co pursuant to the mandatory rule under O 64 r 1 of the Rules of the High Court 1980 ('RHC 1980').

[17] The non-filing and serving of a notice of change of solicitor in the context of the facts of the present case was not a mere irregularity which could be construed as a technical non-compliance of the rules, but something more serious than that. Non-compliance of O 64 r 1 of the RHC 1980 would have occasioned a substantial miscarriage of justice. Order 64 r 1 is absolutely unambiguous. Adherence of this order will enable the court and all the relevant parties to a proceeding to identify both the previous and the new solicitors acting for a party, and side lining or separating anyone else without distinctive authority, a stranger. The latter possessing no legal standing and unrecognised by anyone, can never be accorded any locus standi, and any contribution unless waived must remain void, (see *Concrete Engineering Products Bhd v Merces Builders Sdn Bhd & Anor* [2004] 3 MLJ 367; [2004] 2 CLJ 531).

[18] Order 64 r 1, must be complied with. It is a mandatory requirement. The new counsel or firm of solicitors has locus standi to appear on behalf of his clients only upon filing the requisite notice of change of solicitors. It is trite law that upon service of any court process a litigant can elect either to conduct a case entirely in person or to entrust the case entirely to his counsel or solicitors. Order 64 r 1 prescribes the requisite notice that must be filed to give counsel the necessary standing. It is only upon the filing of that requisite notice that

counsel has an authority to appeal on their client's behalf, and to enter into a compromise, subject of course to any express limitation imposed on that authority by the client.

(See *Sathivel Alagarsamy v Lakshmi Vellasamy* [1998] 3 CLJ Supp 343.)

In the absence of proof that a notice of change of solicitors on the appointment of Messrs Rastam Singa & Co had been filed on behalf of the appellant, the court finds that the consent order entered into by Mr Jeyakuhan from that firm on behalf of the appellant on 8 July 2009 in clearly not valid and upon application by the appellant, must be set aside.

[19] In a situation like in the present case where the solicitors purportedly acting for the appellant was without authority to enter into a consent order and the solicitors of the respondents did not know about the limitation, *Halsbury's Laws of England* (3rd Ed), p 51, para 74 states as follows:

> The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. In some cases, where the matter is within the ordinary authority of counsel, the courts have refused to inquire whether there was any such limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel. But the true rule seems to be that in such case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side.

[20] Again, the Federal Court in *Khaw Poh Chhuan's* case had also ruled that 'even if lack of consent was unknown to the other side, the court has the power to interfere with such consent order where grave injustice would be could by allowing the consent order to remain'.

[21] The authorities cited above clearly show that there is inherent jurisdiction in a court of first instance to set aside a consent order that it has made and which has been entered where it is clearly shown that a party did not in fact consent to the order granted (see *Stewart v Complex* (1990) 107 NBR 407; *Waitemata City Council v Mackenzie* [1988] 2 NZLR 242 — New Zealand Court of Appeal).

GRAVE INJUSTICE TO THE APPELLANT

[22] The issue of grave injustice is an important consideration in an

application to set aside a consent order. In the present case there is a clear indication that the appellant actually never wanted to withdraw its claim against the respondents and wanted to proceed with the case. The appellant's cause of action in tort had accrued since the year 1999 and the limitation period of six years under s 6(1) of the Limitation Act 1953, has lapsed when this action was withdrawn on 8 July 2009. Even though the action had been withdrawn with liberty to file afresh, the appellant is no longer entitled to re file the action afresh in court due to the issue of limitation. Therefore the appellant is seriously prejudiced if the said consent order is not set aside. By contrast, the respondents will not be seriously prejudiced if the said consent order is set aside because the respondents were ready to defend the appellant's action at any time as the respondents themselves had previously agreed for the appellant's action to be filed afresh.

CONCLUSION

[23] Based on the above considerations we are of the view that the learned judge had erred in failing to consider relevant considerations in coming to her decision in this case. In the interest of justice and on the balance of justice, it would be fair, just and proper for this court to set aside the said consent order in order to prevent grave injustice to the appellant.

[24] We therefore, allow the appeal with costs of RM5,000 to the appellant and order that the whole of the consent order dated 8 July 2009, recorded by the High Court including the part that relate to 'no order as to costs' the subject matter of the cross appeal by the respondents be set aside. We also make an order that the deposit is to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kanesh Sundrum